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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES PLYLER, *et al.*,
Appellants,
v.
J. AND R. DOE, *et al.*,
Appellees.

STATE OF TEXAS, *et al.*,
Appellants,
v.
CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN, *et al.*,
Appellees.

On Appeals from the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE BISHOP OF THE EPISCOPAL DIOCESE OF DALLAS, TEXAS, AS AMICI CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963, at the request of the President of the United States, to involve private attorneys in the national effort to assure equal rights for all members of society. The Lawyers' Committee and its Washington,

D.C. local affiliate long have provided volunteer legal representation to noncitizens before courts, agencies, and legislative bodies in matters involving their constitutional rights.

The interest of the Washington Lawyers' Committee arises from its longstanding concern for ensuring the full vindication of the constitutional rights of the nation's substantial noncitizen population to equal protection and due process of law. The decision of these cases will affect importantly the constitutional rights of all noncitizens physically present in the United States. The Washington Lawyers' Committee submitted a Brief *Amicus Curiae* in the Fifth Circuit in *Plyler v. Doe* in support of appellees.

The Bishop of the Episcopal Diocese of Dallas, Texas, is The Right Rev. A. Donald Davies, D.D. The Diocese of Dallas consists of 48 counties in north central Texas, including Dallas and Fort Worth, with a population in excess of 3 million people. The Diocese first began working with undocumented Mexican workers in the early 1950s. In 1975, the Diocese, under the leadership of Bishop Davies, sponsored large numbers of alien refugees. Since then, the Diocese has provided pro bono legal services to the refugees and undocumented Mexican aliens. After passage of the statute at issue here, Bishop Davies founded and continues to support alternative schools for children of undocumented Mexican parents excluded from the public schools. The decision here will affect the future need for these alternative schools.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases present the important question whether a State may deny a free public education to an entire class

[1] All the parties have given written consent to the filing of this Brief. Copies of those consents have been lodged with the Clerk of the Court.

of undocumented alien children because of the presumed misconduct of their parents in entering this country. Although the other submissions to this Court address a broad range of issues, the cases may be decided on traditional equal protection grounds. Texas simply has failed to articulate any rational State basis for discriminating against these children.

First, it is clear that the Equal Protection Clause applies in these cases. The plain language of the Fourteenth Amendment and prior decisions of this Court establish that, with limited exceptions not applicable here, all persons physically present within the territorial boundaries of a State are entitled to the equal protection of its laws. To hold that the Equal Protection Clause does not apply to undocumented aliens would countenance intolerable discrimination by the States. In addition, application of the Clause would not have sweeping consequences; the fact that undocumented aliens are protected does not mean that they "must be placed in a single homogeneous legal classification" with citizens for all purposes. *Mathews v. Diaz*, 426 U.S. 67, 78 (1976).

Furthermore, the Texas statute[2] should be subjected to strict judicial review under the Equal Protection Clause, both because it deprives undocumented children of a fundamental right—access to basic education—and because it discriminates against them on the basis of their national origin.

But even if the rational basis test is the appropriate standard, the Texas statute must fall. It cannot be defended as an intentional effort to establish additional disincentives to illegal immigration. Regulation of immigration is an exclusively federal function into which the States may not intrude. Even if regulation of immigration were a permissible State purpose, Section 21.031

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[2] Tex. Educ. Code Ann. tit. 2, § 21.031.

cannot withstand scrutiny because it bears too attenuated a relationship to the causes of illegal immigration. The statute also violates the Equal Protection Clause by attempting to compel acceptable parental behavior by punishing their children.

Section 21.031 improperly relies upon a child's nominal federal immigration status as a test of eligibility for education. Under federal law, undocumented status is not a litmus test for determining whether a child is deportable or ultimately will be permitted to reside permanently in the United States. In addition, Texas officials lack the institutional competence to make predictions as to the likely operation of federal law.

Nor can Section 21.031 be justified as an attempt to preserve the State's fiscal integrity. Texas has failed to articulate any valid reason for its distinction between two groups of students—undocumented children and citizen children or legally resident aliens—who are similarly situated for its purposes. Furthermore, Texas' implicit encouragement of illegal migration, by its policy on employment of undocumented aliens, is fundamentally inconsistent with its effort to deny education to those workers' children on the ground that their presence here is improper. This is especially true here, because the undocumented workers contribute to the support of the public schools on the same basis as other taxpayers.

Appellees do not seek, and a decision in their favor would not establish, a general right for undocumented aliens to participate in all State social benefit programs. Nor would it lead to invalidation of all State alienage laws. Rather, any challenges to such other provisions must be determined on a case-by-case basis, depending on such factors as the nature of the particular service involved, how it is financed, the statutory context in which the challenged law appears, and the personal responsibility of those who are excluded for immigration violations.

ARGUMENT

I. THE EQUAL PROTECTION CLAUSE APPLIES TO UNDOCUMENTED ALIENS.

The language of the Fourteenth Amendment and prior decisions of this Court demonstrate that the Equal Protection Clause applies even to aliens who unlawfully entered the United States.

By its terms, the Equal Protection Clause applies to "any person . . . within [the] jurisdiction" of a State.[3] The plaintiffs are natural persons. They reside within the territorial jurisdiction of the State of Texas and are subject to its civil and criminal laws. Under the plain language of the Equal Protection Clause, they are entitled to its protection.[4]

Although this Court has not explicitly resolved the question, its prior decisions support the proposition that undocumented aliens are entitled to equal protection. For instance, in *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), the Court stated:

> "The Fourteenth Amendment . . . is not confined to the protection of citizens . . . . These provisions [the

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[3] Section I of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[4] The legislative history of the Fourteenth Amendment and the civil rights statutes enacted contemporaneously with it also indicate that undocumented aliens are covered by the Equal Protection Clause. *See* 36 Cong. Globe, 39th Cong., 1st Sess. 2766 (May 23, 1866) (Sen. Howard); 42 Cong. Globe, 41st Cong., 2d Sess. 1536 (Feb. 24, 1870) (Sen. Stewart).

> Due Process and Equal Protection Clauses] are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . . The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court." [5]

The Court's construction of the Citizenship Clause of Section I of the Fourteenth Amendment reinforces its conclusion in *Yick Wo*. In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), the Court held that the phrase "subject to its jurisdiction," within the Citizenship Clause, was a term of art intended to denote all persons physically present within the territorial borders of the United States except diplomats and other official representatives of foreign countries who, although physically present here, remain subject to the jurisdiction of their sovereign. The Court also concluded that the phrase "within its [a State's] jurisdiction" in the Equal Protection Clause is similar in meaning to the comparable jurisdictional provision of the Citizenship Clause. *Id.* at 687.[6] Plaintiffs are not official foreign representatives;

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[5] *Accord, Wong Wing v. United States*, 163 U.S. 228 (1896) (aliens unlawfully present in the United States are "persons" entitled to the protection of the Due Process Clause of the Fifth Amendment).

Other courts have found that the Equal Protection Clause applies to undocumented aliens. *See, e.g., Bolanos v. Kiley*, 509 F.2d 1023, 1025 (2d Cir. 1975) (Friendly, J.) (Equal Protection Clause applies "even to aliens whose presence here is illegal"); *Holley v. Lavine*, 529 F.2d 1294 (2d Cir.) (*per curiam*), *cert. denied*, 426 U.S. 954 (1976).

[6] The Court stated:

> "It is impossible to construe the words 'subject to the jurisdiction thereof,' in the opening sentence [of the Fourteenth

therefore, under the logic of *Wong Kim Ark*, they are within the jurisdiction of Texas and entitled to equal protection of its laws.

Prior decisions construing the Due Process Clause also show that undocumented aliens are entitled to equal protection. This Court long has held that even aliens whose presence here is unlawful are "persons" protected by the Due Process Clause.[7] Texas has failed to cite any portion of the legislative history of the Fourteenth Amendment which suggests that Congress intended to use the word "person" in a narrower sense in the Equal Protection Clause.

The language of other parts of the Fourteenth Amendment confirms that the Equal Protection Clause extends to undocumented aliens. The Privileges and Immunities Clause, part of the same sentence in Section I as the Equal Protection Clause, applies not to "any person" but to "citizens of the United States." Congress selected the term "persons," with its correspondingly broader meaning, rather than "citizens" in the Equal Protection Clause. *See Sugarman v. Dougall*, 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting). Similarly, Section II of the Fourteenth Amendment requires the apportionment of seats in the House of Representatives according to "the whole number of persons in each State, ex-

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Amendment], as less comprehensive than the words 'within its jurisdiction,' in the concluding sentence of the same section; or to hold that persons 'within the jurisdiction' of one of the States of the Union are not 'subject to the jurisdiction of the United States.'" 169 U.S. at 687.

[7] *See Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (the Due Process Clauses of the Fifth and Fourteenth Amendments protect "[e]ven one whose presence in this country is unlawful . . . ."); *Shaugnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

cluding Indians not taxed." [8] The legislative history of Section II indicates that Congress considered and rejected proposals to adopt narrower terms, such as "voters" and "citizens," with full knowledge that use of the term "person" would result in representation based in part on the relative distribution of unnaturalized aliens and other individuals not authorized to vote by the States.[9] Read as a whole, the Fourteenth Amendment thus demonstrates that the Equal Protection Clause applies to all persons, regardless of their immigration status.

Texas' primary objection to application of the Equal Protection Clause to undocumented aliens is not a constitutional argument based on the language and legislative history of the Fourteenth Amendment. Rather, it is a practical concern that undocumented aliens would, if covered, automatically become eligible for many social services. But a decision that the Equal Protection Clause does not apply to these people would produce intolerable results. As the Fifth Circuit noted, absent the protection of the Clause, a State could, for example, impose more severe penal sanctions on undocumented aliens for violation of its criminal laws. *Doe v. Plyler*, 628 F.2d at 456 & n.20.

On the other hand, the conclusion that undocumented aliens are protected by the Fourteenth Amendment does not establish their entitlement to receive any particular State benefit or determine the conditions a State consti-

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[8] This provision of Section II has been held to require the inclusion of undocumented aliens in the census for purposes of apportioning Congressional seats. *Federation for American Immigration Reform v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C.), *appeal dismissed*, 447 U.S. 916 (1980), *aff'd mem.*, No. 80-1246 (D.C. Cir., Nov. 6, 1980), *cert. denied*, 101 S. Ct. 1696 (1981).

[9] 36 Cong. Globe, 39th Cong., 1st Sess. 359 (Jan. 22, 1866) (Sen. Conkling).

tutionally may attach to its enjoyment.[10] A State may, in proper circumstances, adopt classifications denying benefits even to lawfully admitted aliens without violating the Equal Protection Clause.[11] The important issue is the kind of classifications States constitutionally may draw with respect to undocumented aliens, and under what conditions. As demonstrated below, that question can be answered only on a case-by-case basis, depending upon the appropriate standard of review and the specific State purposes allegedly advanced by the challenged legislation.

For these reasons, the Court should hold that all natural persons (except official foreign representatives) physically present in the United States, including aliens who entered the country unlawfully, are entitled to equal protection of the laws.

II. SECTION 21.031 SHOULD BE SUBJECTED TO STRICT JUDICIAL SCRUTINY BECAUSE IT RESTRICTS THE EXERCISE OF A FUNDAMENTAL RIGHT AND IS BASED UPON AN INHERENTLY SUSPECT CLASSIFICATION.

We join with appellees and other supporting *amici* in urging that Section 21.031 be closely scrutinized because it absolutely deprives undocumented children of a fundamental right—access to a free, basic education. The statute also discriminates against the children on the

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[10] As the United States correctly noted, a decision that Section 21.031 is unconstitutional would not make undocumented aliens eligible for federal benefit programs from which Congress has excluded them. The Court recognized in *Mathews v. Diaz*, 426 U.S. at 79-80, 84-85, that Congress, in the exercise of its plenary authority over immigration, may draw distinctions between aliens and citizens that States are prohibited from making by the Equal Protection Clause.

[11] *See, e.g., Ambach v. Norwick*, 441 U.S. 68, 73-75 (1979); *Foley v. Connelie*, 435 U.S. 291, 295-96 (1978).

basis of a suspect classification—national origin. Because these arguments are developed at length by appellees, we address them only briefly.

The Court has long recognized the fundamental importance of education in our society. *See Brown v. Board of Education*, 347 U.S. 483, 493 (1954). The permanent, debilitating effect upon the plaintiff children of total exclusion from education was conceded by Texas and amply demonstrated by the evidence at trial.[12] As the district court found in *Alien Children*,

> "[C]hildren who are excluded from school suffer great harm . . . .
>
> "The experts who testified on the effect of the exclusion on children unanimously agreed that the damage caused was severe . . . .
>
> "Other testimony by educational experts [demonstrated] that children excluded from school would be unable to acquire the formal literacy skills which permit progress within a society." 501 F. Supp. at 560, 561, 562.

The courts below also found that many of the excluded children are now or will become eligible to be permanent resident aliens (and thus ultimately citizens) and that Section 21.031 permanently will interfere with their ability to exercise basic political rights. *Id.* at 561. Accordingly, the Court should hold that basic education is a fundamental right and that the Texas statute, which absolutely denies undocumented children access to public education, must be strictly scrutinized.[13]

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[12] The parties agreed that "[a]ny school-age child is severely harmed by being denied access to an education." Uncontested Issue of Fact 14, Joint Pretrial Order, *In re Alien Children Education Litigation*, S.D. Tex., MDL No. 389, at 14a.

[13] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), is not to the contrary. The Court there explicitly did not decide whether a statute totally denying children access

Furthermore, Section 21.031 should be subjected to strict scrutiny because the classification is based on national origin. The necessary effect of Section 21.031 is to discriminate against persons of Mexican origin. Although persons of other nationalities may be affected, it is undisputed that the vast preponderance of the excluded children are of Mexican origin, historically a disfavored political minority in Texas. *See, e.g.*, Brief *Amici Curiae* of the National Education Association, *et al.* at 44-56.[14]

III. SECTION 21.031 IS UNCONSTITUTIONAL UNDER ANY STANDARD OF REVIEW BECAUSE IT IS NOT RATIONALLY RELATED TO ANY LEGITIMATE STATE PURPOSE.

If, as we urge, the Court determines that heightened scrutiny is appropriate, there can be little question that Section 21.031 is unconstitutional. Texas conceded before the Fifth Circuit, and appellees have shown convincingly, that the statute does not bear a close relationship to an important State purpose.[15] Even if the Court de-

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to a free, basic education should be subjected to strict scrutiny. *Id.* at 25 n.60. The Texas statute there at issue did not deny any child access to education but simply determined the relative allocation of State financial support among various school districts.

[14] Even if the Court determines that strict scrutiny is not appropriate, Section 21.031 nevertheless should be subjected to heightened judicial review. The statute creates an alienage-based classification, a kind of distinction which this Court has held requires close scrutiny because of the political powerlessness of this discrete and insular minority. *E.g., Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977). Moreover, the statute penalizes children for their parents' alleged actions. In striking down a statute which penalized illegitimate children, this Court noted that where "children can affect neither their parents' conduct nor their own status," the Equal Protection Clause "requires more than the mere incantation of a proper state purpose." *Trimble v. Gordon*, 430 U.S. 762, 769, 770 (1977).

[15] "[T]here is no question that under a strict scrutiny standard, either through the concept of fundamental right of education or

cides that heightened scrutiny is not appropriate, however, the statute nonetheless should be held unconstitutional, because it bears no rational relationship to any legitimate State purpose.

After advocating various theories below, Texas' counsel have suggested in this Court that Section 21.031 was enacted to assist federal immigration authorities, by reducing incentives for illegal immigration, and to preserve the State's fiscal integrity. However, as Texas has conceded, there is no legislative history setting forth the legislature's motivation or purposes in adopting the statute.[16] Texas school officials admitted at trial that there had been no advance assessment of the need for or the likely impact of the statute.[17] Thus, the statute must be defended on the *post hoc* rationalizations of its counsel.

Even if Texas' asserted goals of deterring illegal immigration and preserving its financial resources were legitimate, excluding the plaintiff children from the public schools is an unconstitutional means of achieving those goals. In addition, the irrationality of the means employed by the State constitutes strong evidence that the

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of disadvantaging children or of suspect classifications of alienage, that the statute in Texas must fall." Brief of the State of Texas and Texas Education Agency in *In re Alien Children Education Litigation*, No. 80-1807, C.A. 5, at 14.

[16] *See* Joint Pre-Trial Order, Uncontested Issue of Fact 6 ("The parties have not been able to locate any written legislative history concerning Section 21.031. . . .").

[17] *See, e.g., In re Alien Children Education Litigation*, 501 F. Supp. at 574. Prior to its amendment in 1975, Section 21.031 did not exclude undocumented children from the public schools. Indeed, the Attorney General of Texas concluded that local school districts were without power to exclude undocumented aliens. He further indicated that such an exclusionary provision would be of questionable validity under the Equal Protection Clause. *See* Attorney General Opinion No. H-586, April 18, 1975, Plaintiffs' Exhibit No. 2 in *In re Alien Children Education Litigation*.

Texas legislature did not enact the statute to further the benign goals now suggested by its counsel.[18]

A. Section 21.031 Cannot Be Justified As An Attempt To Create Disincentives To Illegal Immigration.

The Texas statute cannot be justified as an attempt to regulate immigration or to create additional disincentives to illegal immigration. A State may not constitutionally legislate for these purposes; any statute actually having these effects is void under the Supremacy Clause. In any event, as the courts below correctly concluded, Section 21.031 bears such an attenuated relationship to deterring illegal immigration that it cannot be sustained on this ground. Moreover, the statute improperly relies upon a child's federal immigration status as the standard for admission to school.

1. *Texas May Not Defend Section 21.031 As An Attempt To Deter Illegal Immigration.*

Section 21.031 does not bear a reasonable relationship to a legitimate *State* purpose and thus cannot withstand scrutiny under the Equal Protection Clause. Texas may not justify its statute merely by adopting a federal purpose as its own. If a State "wishes to borrow a federal classification, it must seek to rationalize the distinction in the new setting. Is the distinction a reasonable one for the purposes for which the state desires to use it? To that question it is no answer that the distinction may be rationalized for the purpose for which Congress used it."[19] As the court below correctly observed,

> "The State's use of a federal classification does not automatically validate [the statute]. A State may

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[18] *See, e.g., Department of Agriculture v. Moreno*, 413 U.S. 528, 536-37 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975).

[19] *Oyama v. California*, 332 U.S. 633, 664-65 (1948) (Murphy, J., concurring).

> incorporate a federal classification into its own laws; however, the State's use of the distinction must meet the appropriate equal protection standard, whether it be rational basis or strict scrutiny." *Doe v. Plyler*, 628 F.2d at 460 n.31.

Thus, Texas may not justify an otherwise arbitrary classification on the basis of federal distinctions between documented and undocumented aliens.[20] The State must articulate its own independent purposes for the law.

The creation of additional disincentives to illegal immigration is not a legitimate object of State legislation. The regulation of immigration and naturalization is an exclusively federal function into which the States may not intrude.[21] Since the federal power in this area is plenary, any State statute intended to affect the flow of immigration, even a statute supportive of the federal program, is invalid under the Supremacy Clause. Indeed, as the United States noted in its Brief, Section 21.031 necessarily would be void under the Supremacy Clause if it had more than a speculative and indirect impact upon immigration.[22] Thus, Texas cannot legitimately defend Section 21.031 for equal protection pur-

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[20] *E.g., Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977); *Mathews v. Diaz*, 426 U.S. 67, 84-85 (1976).

[21] *E.g., DeCanas v. Bica*, 424 U.S. 351, 354-55 (1976); *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941); *see also Arrowsmith v. Voorhies*, 55 F.2d 310 (E.D. Mich. 1931). The exclusive right of the federal government to regulate immigration was well established even prior to the enactment of the first national laws restricting foreign migration. *See, e.g., Henderson v. Mayor of New York*, 92 U.S. 259 (1876); *Chy Lung v. Freeman*, 92 U.S. 275 (1876); *Passenger Cases*, 7 How. (48 U.S.) 283 (1849); 1 Gordon & Rosenfield, *Immigration Law and Procedure*, § 1.5 at 1-33 (1980).

[22] We believe the United States formulated the correct test (Br. at 14): The Texas statute can survive the Supremacy Clause only if it [1] "is intended to deal with local problems caused by illegal immigration" and [2] "has not been shown to have any more than a speculative and indirect incremental impact on immigration . . . ."

poses as a deterrent to illegal immigration—even assuming denying undocumented children an education were a rational method of immigration control.

DeCanas v. Bica, 424 U.S. 351 (1976), provides no support for Texas' position. California did not attempt to defend its statute as a deterrent to illegal immigration. Instead, it relied on a proper and independent State purpose—the preservation of employment opportunities for its own citizens and legal residents. The Court based its preemption decision on the finding that the statute was not directed at regulation of immigration. 424 U.S. at 355-56.[23] Thus, as the United States properly observed (Br. at 13-14), *DeCanas* cannot be interpreted as authorizing State statutes intended to deter illegal immigration.

2. *Section 21.031 Bears Such An Attenuated And Speculative Relationship To Deterrence Of Illegal Immigration That It Cannot Provide A Rational Basis For Discrimination Against Undocumented Aliens.*

Even if the deterrence of illegal immigration were a permissible State purpose, Section 21.031 could not be upheld on that basis because it bears such an attenuated relationship to the causes of that immigration.

The evidence adduced in the district courts demonstrates overwhelmingly that the availability of employment opportunities is the principal motivation for illegal immigration.[24] The record shows that the vast majority

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[23] Contrary to Texas' contention, the Court did not consider the validity of the California statute under the Equal Protection Clause; the only question raised in the case was the operation of the Supremacy Clause.

[24] *Doe v. Plyler*, 628 F.2d at 451, 461. All major studies have concluded that the availability of jobs prompts immigration by undocumented aliens. Since the decision below, similar conclusions have been reached in two major reports issued by the federal Commission charged with recommending amendments to the immigration laws. *See, e.g., U.S. Immigration Policy and the National*

of undocumented immigrants are young, single, and seeking employment.[25] Texas, however, does not prohibit employment of undocumented aliens. Furthermore, as the courts below found, access to public education for their children is an insignificant causative factor in the immigration of undocumented workers to Texas.[26] The record also shows that only a minute fraction of undocumented workers ever bring their children to the United States.[27] Thus, the Fifth Circuit correctly decided that Section 21.031 bears only the most attenuated and ineffectual relationship to immigration control.

The effect of the Texas statute is further attenuated because it is not directed at the persons who make the decision to immigrate—the parents. Although Texas in-

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Interest, Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy (March 1981), at 36 ("[a]ll studies indicate that undocumented/illegal aliens are attracted to this country by U.S. employment opportunities"), 59 ("[t]he vast majority of undocumented/illegal aliens are attracted to this country by employment opportunities"). *See* Staff Report of the Select Commission on Immigration and Refugee Policy 490-91 (April 1981). *See* n.26 below.

[25] *See Doe v. Plyler*, 628 F.2d at 460-61.

[26] *See, e.g., Doe v. Plyler*, 628 F.2d at 460-61; *id.*, 458 F. Supp. at 585 ("[c]harging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration . . ."); *In re Alien Children Education Litigation*, 501 F. Supp. at 578 ("the evidence demonstrates that undocumented persons do not immigrate in search for a free public education. Virtually all of the undocumented persons who come into this country seek employment opportunities and not education benefits . . . . There was overwhelming evidence . . . of the unimportance of public education as a stimulus for immigration.").

Texas seeks to reargue this factual issue in this Court (Br. at 28-30), relying on language in the concurring opinion in *Doe v. Wright*, 648 F.2d 432, 439 (5th Cir. 1981) (Reavley and Clark, JJ., concurring). That concurring opinion, however, does not appear to have been based upon review of a factual record.

[27] *See Doe v. Plyler*, 628 F.2d at 460-61; *In re Alien Children Education Litigation*, 501 F. Supp. at 578 n.83.

tends to affect parental behavior, Section 21.031 punishes their children, innocent victims who bear no responsibility for the parents' decision to immigrate.[28] The children cannot modify their parents' residence in order to avoid punishment. Even under the rational basis standard, this generation-skipping impact renders Section 21.031 unconstitutional. This Court's decisions establish that the Equal Protection Clause will not tolerate a State effort to compel acceptable behavior from parents by imposing disabilities on their children in this fashion.[29]

Furthermore, Section 21.031 violates the Equal Protection Clause because it employs an eligibility test, the child's federal immigration status, which does not bear a rational relationship to the ultimate question whether the child will be permitted to remain permanently in the United States.[30] Section 21.031 permits citizens and "legally admitted aliens" to attend the public schools. But undocumented status is not a litmus test for deportability under federal law. Texas, however, improperly relies on this status as determinative of a child's deportability and thus his ineligibility to attend school.

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[28] *In re Alien Children Education Litigation*, 501 F. Supp. at 582-73; *Doe v. Plyler*, 458 F. Supp. at 582. Texas has conceded that it is "aware of no instance in which undocumented alien children have come to the United States not accompanied by their parents." Joint Pretrial Order, Uncontested Issue of Fact 17.

[29] *E.g.*, *Trimble v. Gordon*, 430 U.S. 762, 769-70 (1977); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175-76 (1972).

[30] The Brief of the United States did not consider whether Texas' reliance on the child's immigration status was rationally related to a proper State purpose. The United States addressed only the preliminary question whether Texas' incorporation of the federal classification was preempted by the Supremacy Clause and argued that it was not, in certain narrow circumstances (Br. at 16 n.1). In so concluding, the United States made critical assumptions about how Section 21.031 is interpreted and applied (Br. at 16). The United States failed, however, to cite any record support to demonstrate that the statute actually is implemented in the manner it suggests is necessary in order to avoid conflict with federal law.

Undocumented status does not, by itself, provide an objective measure of whether a person is deportable or will ever be deported. A person who enters the United States without documentation may be expelled only pursuant to a formal deportation order issued after a federal administrative proceeding. At the hearing, the alien is entitled to substantial due process rights, and the government bears the burden of proving he is deportable by clear, convincing and unequivocal evidence.[31]

The immigration laws afford undocumented aliens many avenues for relief which may allow them to remain permanently in the United States.[32] For example, 8 U.S.C. § 1153 (1976), establishes preference categories for admission of aliens who have specified family relationships to adult citizens. The INS may decide not to pursue proceedings against an undocumented alien under its "deferred action" program.[33] And even if a person has been formally determined to be deportable, he may peti-

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[31] 8 U.S.C. § 1252(b) (1976); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (due process); *Woodby v. INS*, 385 U.S. 276, 285-86 (1966) (burden of proof).

[32] Thus, an alien may petition the Attorney General for adjustment in immigration status, 8 U.S.C. § 1255 (1976); suspension of deportation and adjustment of status to that of an alien lawfully admitted for permanent residence, *id.*, § 1254(a) (1976); or withholding of deportation because of concern that his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion, *id.*, § 1253(h), *as amended*. The decision whether to grant adjustment of status is committed to the discretion of the Attorney General; his decisions are the product of weighing complex equitable considerations. *See INS v. Wang*, 450 U.S. 139 (1981) (*per curiam*). Texas officials plainly cannot predict, with any degree of certainty, the outcome of the Attorney General's decision.

[33] The principles governing the "deferred action" program are set forth in INS Operations Instructions 103.1(a)(1)(ii) (issued April 30, 1975). Among the factors arguing for deferral are "tender age," "long residence in the U.S.," and a "family situation that would be affected by expulsion." *Id. See* 1A Gordon & Rosenfield, *Immigration Law and Procedure*, § 5.3e, at 5-48 to 5-52.

tion under 8 U.S.C. § 1254(a) for suspension of deportation and adjustment to permanent resident status if he has been physically present in the United States for at least seven years and his deportation would, in the Attorney General's opinion, result in "extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States . . . ."[34] In addition, the Administration has proposed a wholesale immigration amnesty plan which could, if adopted, lead to the adjustment of status of many of these children. *See* p. 26 n. 46 below.

As the district courts found, many of the undocumented children affected by Section 21.031 currently are eligible to or ultimately will become documentable as permanent resident aliens.[35] The children and their families have developed close ties to society; in many instances, they would have strong equitable arguments for favorable treatment. For example, three of the four plaintiffs in *Doe v. Plyler* have resided in the United States for more than ten years, and each plaintiff has at least one child who is undocumented and one or more children who are United States citizens.[36] Even if the government successfully initiated deportation proceedings, these persons would, under established federal prac-

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[34] *See* 2 Gordon & Rosenfield, *Immigration Law and Procedure*, § 7.9d, at 7-164.3-.6, for a detailed discussion of the factors considered by the INS in these decisions.

The decision in *Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980), *cert. granted*, 50 U.S.L.W. 3211 (October 5, 1981), involving the constitutionality of the one-house veto provision of Section 1254(c), will not affect the essential point that the immigration law contains numerous ameliorative provisions.

[35] *Doe v. Plyler*, 458 F. Supp. at 581 & n.14; *In re Alien Children Education Litigation*, 501 F. Supp. at 559 & n.23. Texas has conceded that "[s]ome undocumented children residing in the State of Texas are documentable." Joint Pre-Trial Order, Uncontested Issue of Fact 7.

[36] *Doe v. Plyler*, Transcript of September 9, 1977 Hearing at 53, 57, 90, 96, 104-05, 120, 122.

tice, have strong claims for deferred action or for suspension of deportation and adjustment to permanent resident status. After reviewing substantial testimony on the operation of the federal immigration laws and the status of the plaintiffs, the courts below concluded that these undocumented children and their parents are, for all practical purposes, permanently present in the United States.

While Section 21.031 thus excludes children who are currently documentable, the statute also is plainly underinclusive. It does not exclude children of parents who may be subject to expulsion for violation of one of the many other deportation provisions besides the prohibition of illegal entry.[37] Persons who enter the United States lawfully but thereafter become subject to deportation are similarly situated to unlawful entrants for both federal immigration and State purposes. The Texas statute, however, does not apply to these other classes of deportable aliens, even though, for example, "[v]isa abusers are more likely to have children enrolled in U.S. schools (7.1 percent) than persons entering without documentation (2.2 percent)."[38]

In sum, Section 21.031 bears no rational relationship to federal immigration law because it denies undocumented children an education on the basis of the presumed outcome of a hypothetical federal hearing. That proceeding may never be held and might not ultimately determine whether a child will be allowed to reside per-

[37] For example, a lawfully admitted alien is subject to deportation if he violates the terms of his admission, 8 U.S.C. § 1251(a)(9) (1976), becomes institutionalized within five years at public expense for mental disease, *id.*, § 1251(a)(3), is convicted of crimes involving moral turpitude, *id.*, § 1251(a)(4), becomes an anarchist or subversive, *id.*, § 1251(a)(6), becomes a public charge within five years from causes not arising after entry, *id.*, § 1251(a)(8), or becomes a narcotic drug addict, *id.*, § 1251(a)(11).

[38] *Illegal Aliens: Estimating Their Impact on the United States*, Report to the Congress by the Comptroller General, PAD-80-22, 25 (March 14, 1980).

manently in the United States. In light of the complexity of the immigration statute and their lack of specialized competence in this area, Texas officials are not qualified to predict the likely operation of federal law.[39] In these circumstances, it is irrational for Texas to rely upon a child's apparent immigration status to determine whether he should be permitted to attend school.

B. The Texas Statute Impermissibly Discriminates Between Identical Groups Of Students Solely For The Purpose Of Saving Money.

The only other justification proffered by Texas' counsel is that Section 21.031 allegedly preserves the State's financial resources. As a general proposition, Texas has a valid interest in limiting its expenditures, but the approach it has adopted—completely denying education to children whose parents have long supported the public schools—violates the Equal Protection Clause.

Texas' desire to limit expenditures cannot, of itself, constitutionally justify a classification that excludes these children. As the Court concluded in *Graham v. Richardson*, 403 U.S. 365, 376 (1971), such an argument proves too much because it could be used to justify any classification which saved money, no matter how invidious—such as a law denying education to all chil-

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[39] *See, e.g., U.S. Immigration Policy and the National Interest, supra,* at 256-57.

We believe the unconstitutionality of Section 21.031 is implicit in the Solicitor General's argument (Br. 16 n.1) that Texas cannot, consistent with the Supremacy Clause, base eligibility for education on its own determination whether an alien has overstayed his visa or otherwise is deportable. As previously demonstrated, the fact of undocumented entry does not provide an objective litmus test for determining a person's deportability. The same deportation statute and procedures apply to both the illegal entrant and one who otherwise is deportable. Accordingly, it follows that the Constitution also forbids States from denying access to education on the basis of its assumptions about the consequences of a person's undocumented status under federal law.

dren born in 1970.[40] A State, of course, legitimately may seek to conserve its tax revenues. But where, as here, the State attempts to do so by denying eligibility to a discrete class of persons, the Equal Protection Clause requires that the State at least articulate a rational basis for distinguishing between the privileged and disfavored groups. Texas has failed to do so.[41]

The undocumented children are constitutionally indistinguishable for State purposes from other children Texas allows to attend its public schools. All the excluded children live in Texas. Many of them are now or will become documentable in the future. Texas has conceded that the parents of undocumented children contribute to the support of the school system on the same basis as other residents, through payment of State and local taxes.[42] Moreover, while Texas makes much of the

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[40] *Accord, Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

[41] Texas and certain border school districts have renewed in this Court arguments about the anticipated burden of educating undocumented children. However, Texas Governor William P. Clements Jr., recently stated that concern for the cost of educating these children had been "vastly overblown in the first place" and that they could be educated without "serious difficulty." He also noted that less than 11,000 undocumented children actually have enrolled while the stay of Section 21.031 pending appeal has been in force. *N.Y. Times*, September 22, 1981, p. A22 col. 1.

[42] Joint Pre-Trial Order, Uncontested Issue of Fact. The district court in *Alien Children* found that

> "undocumented aliens contribute to government revenues to the same extent as others with similar income. . . . The public school education in Texas is financed primarily through sales taxes and *ad valorem* property taxes. Undocumented aliens are unable to escape the payment of those taxes; they buy consumer goods and they indirectly contribute property tax revenue through the payment of rent." 501 F. Supp. at 570-71.

Because the parents contribute on the same basis as other taxpayers to the support of the Texas school system, this case is distinguishable from *Moreno v. University of Maryland*, 645 F.2d 217

allegedly greater education burden imposed by undocumented alien children, particularly their need for bilingual education, the educational needs of these children are indistinguishable from those of legally resident aliens, who Texas concedes are entitled to attend its schools.[43] As the district court found in *Alien Children*,

> "Like resident alien children, undocumented children are more likely to need bilingual education. Like resident alien children, many undocumented children do not need bilingual education. Indeed, many undocumented children previously have attended schools in other states." 501 F. Supp. at 583 n.104 (citation omitted).

Accordingly, there is no distinction between undocumented children and those allowed to attend school other than their federal immigration status. As demonstrated above, immigration status by itself is not a permissible basis for the State to exclude children from school. Therefore, the district court in *Alien Children* correctly concluded that, since "undocumented children are otherwise similarly situated to the other children in the State," Section 21.031 "is *wholly irrelevant* to the achievement of the State's objective" of conserving funds. 501 F. Supp. at 583 (emphasis added).[44]

(4th Cir. 1981), *cert. granted sub nom. Toll v. Moreno*, 50 U.S.L.W. 3215 (Oct. 5, 1981). Also, unlike the in-state tuition rule involved in *Toll*, the Texas statute unconstitutionally discriminates between noncitizens of Texas and aliens. *See* n.44 below.

[43] Texas has conceded that "[w]hether or not a student needs bilingual education is a function of their [sic] ability to read, write and speak English and not of their immigration status." Joint Pre-Trial Order, Uncontested Issue of Fact 15.

[44] Decisions such as *Vlandis v. Kline*, 412 U.S. 441 (1973), indicate that Texas properly might seek to limit free public education to those who have manifested some degree of attachment to the State. Texas has not raised the point, but in any event it could not sustain the statute. Texas has extended a virtually unqualified right to free public education to United States citizens who cur-

The irrationality of Section 21.031 is further demonstrated when the statute is considered in the context of Texas' overall position with respect to undocumented aliens. Texas, unlike California and 10 other States, has chosen not to prohibit knowing employment of undocumented aliens. Its legislature on several occasions has refused to adopt such legislation. As an inevitable consequence of Texas' policy, undocumented aliens have for many years formed an important part of its blue collar and agricultural labor force. Indeed, powerful economic interests in the State have raised strong objections to any law that would deny them access to this large labor pool.[45] Thus, Texas fairly can be said to have encouraged

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rently live in Texas but who are not citizens of Texas. Tex. Educ. Code Ann. tit. 2, § 21.031(d). As long as the student or his parents do not move to Texas for the "primary purpose" of attending its public schools, the child is entitled to a free public education, regardless whether his parents previously have helped support the schools or the length or degree of their attachment to the State. *See Arredondo v. Brockette*, 648 F.2d 425 (5th Cir. 1981). Children of undocumented aliens, however, are excluded from the schools, even though they may have established a more permanent relationship to the State than non-domiciliary residents and have contributed for many years to the financial support of the educational system.

Texas has no proper constitutional justification for treating persons who are citizens of another State differently from persons who are citizens of another country. *Mathews v. Diaz*, 426 U.S. at 85. Indeed, Section 21.031 is irrational *a fortiori* under *Diaz* because it gives preferential treatment to strangers, with no prior relationship to the State, and punishes persons who have long supported State programs through taxation.

[45] In 1952, for example, the Texas Congressional delegation was instrumental in obtaining enactment of the so-called "Texas Proviso," which eliminated an employment prohibition from the criminal harboring provision of the immigration laws. *See, e.g., Illegal Aliens: Analysis and Background*, Study prepared for the use of the House Committee on the Judiciary, 95th Cong., 1st Sess. 28 (1977). *See generally Sin Papeles: The Undocumented in Texas*, Report of the Texas Advisory Committee to the United States Commission on Civil Rights (January 1980).

illegal immigration across its Mexican border by its deliberate policy.

Against this background, Texas' effort to ban undocumented children from its schools is arbitrary and capricious. The State has attempted to treat the undocumented in a fundamentally contradictory fashion. It first encourages their presence to support its economy. Once they are here, Texas penalizes undocumented children in a way that conveniently minimizes its monetary outlays, while preserving to the State the full benefits of their parents' labor. Under the Equal Protection Clause, Texas cannot seek to conserve its funds by treating the undocumented in such an obviously inconsistent fashion—especially since the undocumented pay taxes to support the very educational system from which their children are excluded.

CONCLUSION

Texas' frustration in dealing with the illegal immigration problem is understandable. Largely because of Congressional inaction, it, along with the other border States, has borne the brunt of the current wave of immigration. But the absence of federal action does not suspend the application of the Equal Protection Clause. Texas still must articulate a permissible basis for distinguishing between those eligible and those ineligible to receive free public education—particularly when those to whom it seeks to deny education have contributed a proportionate share to finance the service.

The ultimate solution for the complex social and political questions surrounding illegal immigration must be provided by the Congress. The nationwide scope of the problem and its possible impact on our international

relations demand comprehensive federal action.[46] Regardless whether federal action is forthcoming, however, the Constitution will not tolerate Texas' attempt to save money by imposing disabilities on innocent victims—the children—in an arbitrary and contradictory manner. In practical terms, Texas asks the Court to sanction the creation of a permanent underclass of immigrant laborers, outside the protection of the Constitution and without hope of receiving the education they need to progress in this society. It is an invitation the Court should decline.

For the reasons stated above, the judgments should be affirmed.

Respectfully submitted,

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[46] Congress has studied the problem of illegal immigration extensively in recent years. In 1978, it established the Select Commission on Immigration and Refugee Policy to evaluate existing laws and recommend improvements. Pub. L. 95-412, 92 Stat. 908 (1978). The last two Administrations have proposed remedial plans designed in part to assist Texas. *E.g.*, the Alien Adjustment and Employment Act of 1977, H.R. 9531, 95th Cong., 1st Sess. (Oct. 12, 1977) and S. 2252, 95th Cong., 1st Sess. (October 28, 1977); *U.S. Immigration and Refugee Policy*, Statement by President Reagan (July 30, 1981). In particular, Congress recently has considered bills which would provide federal reimbursement for State expenditures for undocumented alien children they are required to educate by federal court order. *See* H.R. Bill No. 8053, 96th Cong., 2d Sess. (Aug. 28, 1980), introduced by Mr. Mattox of Texas on behalf of himself and seven other Representatives.